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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 327.

OTIS BEALL KENT, *Petitioner,*

v.

AUSTIN F. CANFIELD ET AL., *Respondents.*

REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR CERTIORARI.

OTIS BEALL KENT,
Petitioner, In His Own Behalf.

Of Counsel:

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OTIS BEALL KENT, *Petitioner*,

v.

AUSTIN F. CANFIELD, LESTER WOOD AND ELIZABETH D. COLEMAN, *Respondents*.

REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

In reply to and refutation of the respondents' objections to the allowance of a Writ of *Certiorari* in this cause, the petitioner respectfully submits:

I. As to the TENABILITY of the Asserted GROUNDS for Allowance of the WRIT.

1. *No EXTENSION of DOCKETING term REQUESTED by Petitioner-Appellant or GRANTED by Appellate Court:* The statement on page 3 of the respondent's brief, that "numerous requests for extensions of time to *docket the appeal* were requested by petitioner and * * * allowed by said Circuit Court", is contradicted by the facts of record. The petitioner-appellant had no occasion to make and never made any such request; and none was ever allowed by the Appellate Court.

The instant appeal was seasonably noted on July 1, 1949. (R. 233). Rule 73-(g) of the Federal Rules of Civil Procedure allowed the appellant 40 days thereafter, or until and including *August 10, 1949,* within which to docket his appeal. He seasonably filed the original Record with the Clerk of the Court of Appeals on *August 10, 1949.* (R. 294). The appeal being thereby docketed within the term permitted by the Rules, the appellant required no extension of said term, and none was either requested by him or granted by the Court. The respondents' citations of the Rules under which the only allowed "extensions of time were granted" (Brief, page 3) are likewise unwarranted by the facts of record and are incorrect; no such extension having been granted to the appellant under either of said Rules.

2. *"EXTRAORDINARY REASONS" Required by Cited Rule 18-(f), Precedent to Permitted Filing of Brief after Time Allowed, Clearly Shown by Appellant's Motion but Ignored by Appellate Court:* As noted by the respondents on page 3 of their brief, Rule 18-(f) of the Rules of the Court of Appeals clearly con-

templates the *permissive* filing of briefs *after the time allowed, "for extraordinary reasons shown".*

The "extraordinary reasons" whereupon the appellant moved for leave to file his brief on appeal *nunc pro tunc* are clearly set forth in his motion of which a transcript is embodied in the record (pp. 259-267), and are epitomized in paragraph 2 on page 9 of his brief now before this Honorable Court. As there explained, the *sole* and *final* responsibility for his not having filed his brief on time was *unanswerably* attributable to a default by the Washington Postoffice on its obligation promptly to have delivered the SPECIAL DELIVERY parcel containing the filing copies of the brief, *clearly showing on its face the need for haste in effecting its delivery,* when the briefs had been received by the postal officials in charge of such matters *at least five hours prior to the closing of the Clerk's office* on the ultimate due date.

3. *Motion for Leave to File nunc pro tunc denied on Grounds not authorized by Rules of Court:* There is nothing in the Rules of the Appellate Court which authorized or justified its denial of the appellant's motion for leave to file his brief *nunc pro tunc,* except his failure—if he had as he had not failed—to show the "extraordinary reasons" which explained and should have excused his unavoidable delinquency.

The respondents' objections, therefore, to the granting of the appellant's motion (Brief, p. 4), on the ground of scandal or impertinence *in his brief,* or because of an *omission from his brief* of a "summary of argument" responsive to the appellees' interpretation of Rule 17-(c)-7, or because of his *omission from the brief,* as alleged, of "any jurisdictional statement", are themselves impertinent to any issue presented by the here impending petition for *Certiorari.*

If the Court of Appeals erred in its denial of the appellant's motion for leave to file, its error in that respect, as hereinafter shown, presented a Federal Question properly cognizable by this Honorable Court. Otherwise, the refusal of the Appellate Court to have permitted the filing of the appellant's brief *automatically foreclosed its consideration of any aspect of the form* or *substance* of the brief; the only ground upon which the Court might have justified its denial of said motion having been an *explicit finding* that the appellant had failed to show the "extraordinary reasons" which if shown would have excused his failure to have filed on time.

In the latter event, the *substantive action* bespoken by the Court's condemnation of any part of the brief as scandalous or impertinent ineluctably constituted an *acceptance of the brief* for filing, whereby it was at least constructively incorporated into the record on appeal; as the Appellate Court must be presumed not wilfully to have transgressed the established Rule interdicting its consideration of any matter extraneous to the record before it. Upon that premise, the brief having been at least constructively filed in advance of the appellees' filing of their motions to dismiss the appeal, the dismissal thereof by the Court of Appeals *eo instante* precipitated the indistinguishable *conflict of decisions* discussed on pages 11-12 of the petitioner's brief, as justifying the granting herein of a Writ of *Certiorari.*

4. *Respondents' Enumeration of Asserted Grounds of Denial of Appellant's Motion for Leave to File Brief nunc pro tunc Incorrect and Impertinent:*

(a). *No Extension of Time for Docketing Appeal.*— The respondents' allusion on page 5 of their brief to any extension of time allowed to the appellant to

"docket his appeal" is unwarranted by the facts of record and is incorrect, as he never required, requested or was granted any such extension. (Par. 1, *ante*).

(b). *Allowed Extensions Incorrectly Characterized as "Numerous".*—The implications of the respondents' reference to the allegedly "numerous" extensions of the time within which the appellant might have filed his brief under the Rule are likewise unfounded and factually inaccurate; the successive extensions of the filing term allowed to the appellant being shown by the pertinent Docket entries (R. 295-6), to have been as follows (Petitioner's italics and parenthetical comments):

> I. Sept. 30, 1949: *Per curiam* order allowing appellant to and including *10 days after action on pending motion to proceed on original record,* within which to file brief.
>
> II. Oct. 31, 1949: Appellant's motion for *definitive extension* of time to file printed brief and appendix to a date *not earlier than February 1, 1950.* (*92 days* from filing date of motion). Oct. 17, 1949: (*47 days after date motion filed*). *Per curiam* order allowing appellant to file his brief *on or before February 1, 1950.* (Reducing *anticipated* filing term of *at least 60 days to 45 days*).
>
> III. Jan. 20, 1950: Appellant's motion to extend time to file brief and appendix to *60 days subsequent to action on this motion.* Feb. 8, 1950: *Per curiam* order allowing appellant *to and including March 16, 1950,* within which to file brief. (Reducing *requested* term of *60* days to *36* days).

The respondents' characterization of the *three aforementioned extensions* of time as "numerous extensions", therefore, either reflects a misconception of the generally accepted meaning of the term "numerous", or constitutes an exaggeration of the established facts.

(c). *Petitioner's Tender of Brief for Filing Sanctioned by Court Rules.*—The respondents' statement on

page 5 of their brief that the appeal herein was dismissed because of the appellant's failure to have filed his brief "under the Rules of the Circuit Court" is incorrect and impertinent, in that his brief WAS duly tendered for filing "UNDER SAID RULES", with a clear and truthful exposition of the "extraordinary reasons" which had precluded its timely filing THEREUNDER. The respondents' correlate assertion that the appeal was dismissed "for the further reason that the briefs as written and tendered contained matters of scandal and impertinence, all in violation of the rules of every Court in the land", is likewise inconclusive as an objection to the allowance of the impending petition for *Certiorari*.

(d). *Appeal NOT dismissed because of scandal or impertinence in Brief of which Filing Refused.*—The Court's refusal to have permitted the delinquent filing of the subject brief was undeniably within its sound discretion, subject only to a just and orderly review of its said refusal as involving an abuse of said discretion; but, having denied to the appellant the relief in terms provided by its own Rule 18-(f), and having dismissed the appeal because of the failure of the Postoffice to have delivered the brief for filing prior to the lapse of its due date, it was clearly not within the province of the Appellate Court to consider any *substantial* aspect of the brief, the filing of which it had prohibited, and which therefore was not of record before it.

5. *No record action taken by Appellate Court herein on January 10, 1950*: The respondents' allusion to the purported action of the Appellate Court, in having "ordered certain parts of a written motion filed by petitioner stricken from the record", is purely gratuitous and palpably impertinent. No order was entered

and no other action of record taken by said Court on January 10, 1950 (R. 295-296); and there is nothing now of record herein which might have justified a statement or an implication to the contrary.

In a superabundance of fairness to the respondents, even though their cited comments are *dehors* the record, it may be noted that an order herein entered by the Court of Appeals on December 17, 1949, extending the filing term for the appellant's brief, directed also that certain portions of the motion thereby adjudicated be stricken from the record; but, if the facts in that respect should be of interest to any Justice of this Honorable Court, the petitioner is prepared to show, with the permission of the Court, that *every word so stricken* by the Appellate Court was either *justified by precedential comments by this and other Courts* in other cases, or was *directly responsive to an admonition theretofore addressed to the then defendant and present petitioner by a Judge of the District Court.* If the Court of Appeals had been aware of the determinative facts, it is respectfully submitted as at least unlikely that any part of the controverted text would have been stricken as either scandalous or impertinent.

6. *Respondents' Objections presupposing Conditions Opposed to Facts Inapposite and Impertinent*: The gratuitous observation on page 5 of the respondents' brief, that they "*would have immediately moved* to strike" if the petitioner's unfiled brief had been seasonably filed, is *aliunde* and impertinent.

7. *Decisions Cited by Respondents Inapplicable to Facts of Record*: The petitioner admits some doubt as to the significance of the respondents' reference on page 5 of their brief to "similar rulings" in "other

instances of this kind"; but none of the cited decisions presumably exemplifying the rulings in question has any determinative bearing upon any issue presented by the petitioner's brief herein. Thus:

In *Hall* v. *Lane,* 48 App. D. C. 279, the Court had found *"no basis * * * in the record"* for an intimation in the stricken brief that "the Land Department of the Government had been controlled in certain cases by sinister influences"; and the brief therein had been stricken *only "after the argument at the bar".* In *Davidge* v. *Simmons,* 49 App. D. C., 398, 266 Fed. 1018, the brief was stricken on the stated ground that the "reproachful allusions" therein to the opposing party were *unsupported by the record;* and the cited action was taken only *after the case had been decided on its merits.* In *Johnson* v. *Bondy,* 72 App. D. C., 360, 114 Fed. (2), 599, a decision also had been rendered on the merits; and the language ordered stricken from the brief comprised at most less than two and one-half pages of the printed text, and not the entirety of the brief, as in the instant case.

No substantive right of any of the offending parties in the cited cases was either denied or abridged by the Court, because of a recourse by said party to the objectionable language stricken from their several briefs; *all said rights having been adjudicated on their merits in advance of summary action by the Courts.* The Appellate Court's refusal to permit the appellant to file his brief, upon his showing of the extraordinary reasons whereupon he had sought to justify said action, unlike the situations environing all the other aforementioned parties, inevitably and arbitrarily divested him of his constitutional right to his day in Court; and even a casual reading of his pleadings on

appeal will dispel any doubt as to the *basic justification in the record* of every word to which the respondents had noted an objection.

The three aforementioned decisions, therefore, are wholly inapplicable to any issue under present advisement; and none of the cited authorities suggests a semblance of justification for the Court's refusal to permit the filing of the appellant's brief *nunc pro tunc, on any ground other than a specific finding* by the Court that he *had failed to show the "extraordinary reasons"* which he must have shown precedently to the Court's acceptance and filing of his delinquently tendered brief.

8. *Correction of Respondents' Imputation and Restatement of Petitioner's "Position"*: The petitioner's premise in support of his request herein for *Certiorari* is not, as imputed by the respondents on page 6 of their brief, that they had "moved too late" in their motions to dismiss his appeal, but that his brief, having been tendered in good faith for filing, in advance of their motions to dismiss, should have been accepted and filed, and not excluded from the record on the ground that it had been tendered too late for filing; this position being amply supported by the decisions of this Honorable Court, the Court of Appeals for the District of Columbia and the Appellate Courts in other Federal Circuits severally cited and discussed on pages 22-25 of his brief in support of his petition for *Certiorari*.

The respondents have likewise misconceived the import of the clause which they have excerpted from the petitioner's brief, wherein he had challenged the "adjudication or characterization by the Court of any part of the brief as scandalous or impertinent". In

lifting the *quoted phrase* from the *context* of the *paragraph* in which it occurred, they have excluded the clarifying word "therefore"; and in so doing they have perhaps unintentionally but none the less effectively distorted the intended meaning of the text, which was merely that IF the Appellate Court had CORRECTLY excluded the brief from the record, the *entirety* of its *substance* was *dehors* the record, and was thereby immunized from censure by the Court.

II. As to the Impendency in the Record of Substantial Federal Questions.

1. *Respondents' Negation of Unparticularized Federal Questions Dehors the Record*: The respondents' comment on page 6 of their brief, that the "petitioner does not claim here that any Federal question is involved", may be held to have refuted any objection implied in their allusion to the subject, and in any event is *dehors* the record. The considerations, however, impelling the respondents to "call the Court's attention to this fact" may justify if not require a brief elaboration of the facts recited in the petitioner's brief, which by inevitable implication at least, present *substantial Federal questions.*

2. *Federal Questions Implicit in Factual Issues Presented by Petition for Certiorari*: In drafting his petition for *Certiorari* the petitioner believed, as it is still his considered belief, that ample grounds for the issuance of the Writ would be and have been shown by his particularization of those provisions only of Rule 38-5-(b) which relate (a) to *conflicting decisions of identical matters* and (b) to *departures from the accepted and usual course of judicial proceedings.* While he did not in terms, therefore, refer to any Federal question *implicit* in the situation presented by his

petition, as an *additional* reason for granting the Writ, he did aver in his brief, and he now respectfully reaffirms his position that the dismissal of his complaint by the District Court and of his appeal by the Court of Appeals deprived him of his constitutional right to his "day in court" (Brief, p. 18); thereby in effect presenting a justiciable Federal Question as to a denial of the due process vouchsafed to him by the Federal Constitution.

3. *Petitioner denied his Day in Court and Due Process*: Amendment V to the Federal Constitution guarantees that: "No person shall * * * be deprived of * * * property, without due process of law;". The property rights so guaranteed have been held to comprehend a chose in action. (*Chemical Foundation* v. *Du Pont,* 29 Fed.-2, 597; Aff. C. C. A., 39 Fed.-2, 366; Cert. Granted, 282 U. S. 819; Affirmed, 283 U. S., 152; *Mooney* v. *Miller,* 195 N. Y. S., 437; *Fisk* v. *Leith,* 299 Pac. 1013, 137 Ore. 459); including a right of action for damages (*Martinez* v. *Fox Valley Bus Lines,* 17 Fed. Supp. 576; *Griffin* v. *Wilcox,* 21 Ind. 370; *Williams* v. *Atlantic Coast Line R. Co.,* 69 S. E. 402, 153 N. C. 360).

The complaint herein (R. 1-64) dismissed by the District Court presented *bona fide* claims whereupon the plaintiff and present petitioner had asserted provable damages of more than $200,000.00; his so asserted claims clearly constituting a *property right* within the protective purview of the Federal Constitution.

A party litigant has not had his "day in court" until he has been afforded an "opportunity to be heard". *Helis* v. *Ward,* 308 U. S. 365; *Old Wayne Mut. Life Assn. of Indianapolis, Ind.,* v. *McDonough, Ind.,* 204 U. S. 8; *Fisher* v. *Jordan,* 32 Fed. Supp. 608. As

stated by the Court in *Leininger* v. *Reichle,* 148 N. E. 384, 389, 317 Ill. 625: "It is a principle that lies at the foundation of all jurisprudence in civilized countries that *a person must have an opportunity of being heard* before a court can deprive such person of his rights. This rule is applicable to all proceedings * * *; and *no court has power to divest a person of a vested right until he * * * has had a reasonable opportunity of being heard in defense of his rights.*" (Petitioner's Italics).

As clearly shown by the record, the Pre-Trial Judge dismissed the petitioner's action against the respondents and their cited codefendants, on the stated ground that his complaint presented *no genuine issue as to a material fact* (R. 230-233); when as a matter of undeniable verity there were then of record before the Court *as many such genuine issues as there were charges in the complaint against all the named defendants and denials in their several answers of all said charges.* (R. 1-90). The Pre-Trial Judge had not only made no effective effort to have read or otherwise informed himself as to the facts, a comprehensive knowledge of which was indispensable to his proper exercise of his judicial functions in the case (R. 236-254); but he peremptorily refused to permit the plaintiff and present petitioner in his own behalf to acquaint him with the determinative facts concerning which the plaintiff's attorney was wholly uninformed and which he had frankly admitted himself unable to discuss. (R. 248-253). The petitioner plaintiff was accordingly denied his "reasonable opportunity of being heard in defense of his rights", and was thereby divested of his constitutional right to his "day in court".

4. *Federal Question Presented by Refusal of Appellate Court to Permit Appellant's Filing of Delinquent Brief Pursuant to Rule 18-(f):* The Court of Appeals, by its promulgation of Rule 18-(f), has reserved to itself the right to permit the filing of delinquent briefs in any case wherein "extraordinary reasons" for a failure to have filed on time are shown. The Court of Appeals has further declared that all its Rules, including of course Rule 18-(f), are to be accorded the effect and force of statutory law. (*Bradley* v. *Pace,* 183 Fed.-2 806; and *Hill* v. *Hawes,* 132 Fed.-2 569, 76 U. S. App. D. C. 308). Any action by the Appellate Court, therefore, involving an interpretation, application or construction of Rule 18-(f) or of any of its other Rules, *particularly those involving any issue of time or limitation,* is juridically analogous to action under a Federal Statute, and presents a Federal Question within the purview of Rule 38-5-(b) of this Honorable Court.

III. As to Established Conflict of Decision Hereby Sought to be Reviewed With Prior Decisions of Appellate Court Below and of Other Appellate Courts.

1. *Respondents' Objections refuted by Antecedent Showings herein and in Petitioner's Original Brief in Support of Petition for Certiorari:* The respondents' pronouncement on page 6 of their brief that "there is nothing in the record here to justify" the petitioner's contention that the decision hereby sought to be reviewed is in conflict with prior decisions of the Court below and of other Appellate Courts, ignores the dismissal of the instant appeal *on grounds never before considered by the Court below* as justifying the dismissal of an appeal, and *peremptorily rejected by the Court of Appeals for the Eighth Circuit,* when urged

in support of a comparable motion to dismiss; as fully discussed on pages 22-27 of the petitioner's original brief, and under caption I of this brief, *ante.*

2. *Decision of Appellate Court below NOT "Consistent with Its Own Decisions" or with Decisions of other Appellate Courts in Comparable Situations:* The assertion by the respondents on page 6 of their brief that the decision of the Appellate Court now sought to be reviewed is "consistent with its own decisions" in other cases, is unfounded and palpably incorrect. So far as an exhaustive review of the published decisions has disclosed, *the Appeals decision in this case is the only instance in which any Court of Appeals has ever sought to justify its refusal to permit the filing of a brief initially tendered after its filing due date, but prior to the filing of an opposing motion to dismiss, on the ground that it contained scandalous and impertinent matter and did not conform with the Rules.*

3. *Conditions Opposed to Facts of Record, even though "Honestly Believed" by Respondents, Impertinent to Instant Issues:* The *impression* expressed by the respondents on page 7 of their brief, that, if the petitioner's brief on appeal had been filed on time, they "honestly believed" the Court below or any other Court "of comparable jurisdiction and dignity would have done the very same thing", propounds a condition opposed to the facts, in that IF the brief "had been filed on time", there would have been no occasion for any Court to "have done the very same thing" which the Court below has done, and which it is honestly believed has required and justified the petitioner's impending request for corrective action by this Honorable Court.

IV. As to Conformance of Impending Petition With Governing Rules.

1. *Impending Petition no less "Direct and Concise" than Required for "Complete Disclosures" Concerning Subject Controversy:* The respondents' objections to the petitioner's brief as "neither direct nor concise", within the limitations of Rule 38-(2), reflect an apparent misconception of the meaning of the quoted terms. The petition in its every word and phrase is meticulously *directed* to a strict observance of the conditions *indicated* in Rule 38-(5) as justifying the granting of a Writ of *Certiorari;* and the petitioner, in drafting his petition, consistently sought to avoid any recourse to an indirect or circumlocutory expression which might have been objectionable either to this Honorable Court or to any of the respondents.

The latter have apparently confused the word "concise", as employed in Rule 38-(2), with the connotation of the words short or brief; but a literal conformance with any such restrictive interpretation of the word "concise", as determining the format of the instant petition, would have been inconsistent with, and would have defaulted on, the specifications of the "clear, definite and complete disclosures concerning the controversy" which have been held to be indispensable in a petition for *Certiorari.* (*Southern Power Company* v. *North Carolina Public Service Company,* 263 U. S., 508.)

In order not unduly to have protracted the text of the petitioner's supporting brief, and at the same time to have presented all the facts which might be deemed "essential to ready and accurate understanding of the points requiring our (the Court's) attention"; (*Furness, Withy & Company* v. *Yang Tsze Insurance*

Association, 242 U. S. 430) the petitioner, conceiving a possibility that the Court might regard a disclosure of the determinative facts involved in the antecedent litigation as indispensable to a correct adjudication of the now impending issues, appended to his brief a *concise abridgement of the complaint,* the arbitrary dismissal of which by the District Court provided the basis for the appeal in turn dismissed by the Order of the Appellate Court now hereby sought to be reviewed. As the entire appendix is based upon and supported by the Record submitted with the impending petition for *Certiorari,* the contention of the respondents that "this Appendix contains matters not properly before this Court for consideration" is opposed to the facts and is clearly untenable.

2. *Precedential Rulings cited by Respondents in Opposition to Petition for Certiorari Consistent with and Clearly Support Text and Format of Petition:* In all but one of the six decisions cited by the respondents on page 7 of their brief, *Certiorari* had been granted upon the Court's misconceptions of the grounds upon which the Writ had been severally sought, and had been dismissed as "improvidently granted", only *after* the Court had ascertained the *true situations* underlying each subject controversy, and had reaffirmed its requirement that petitions in all such cases MUST contain "complete disclosures" of all determinative facts. The sixth of the respondents' citations (*Magnum Import Company* v. *Coty,* 262 U. S. 159) is not in point, in that the cited case involved no application for *Certiorari.*

3. *Respondents Failure to have Controverted Petitioner's Imputations of "Far Departures" by Appellate and District Courts from Accepted and Usual*

Course of Proceedings, Tantamount to Concession that, as respects Unanswered Argument at least, Petition should be sustained as Conforming with Governing Rules:

In *Campbell* v. *Ingram,* 174 Pac. 366, 37 Cal. App. 728, it was held that "Where appellant fails to reply to appellee's argument, *the court may infer that appellant deems the argument unanswerable";* and, by a parity of reasoning, it may likewise be inferred, where the appellee fails to reply to an argument in the appellant's brief, that the appellee deems the argument unanswerable, and therefore concedes it as established by the record. In 4 *C. J. S., Appeal and Error,* Section 1344, page 1937, the statement is noted that "It is a principle of general application under rules of court regulating briefs that statements in appellant's brief, which the rules provide that it shall contain, will be taken as true where * * * such statements are not controverted in appellee's brief." (Citing numerous cases).

CONCLUSION

It is thereupon respectfully submitted that, inasmuch as the respondents have presented in their brief no *tenable objection* to the granting of the requested Writ, the same should be and is prayed to be allowed.

Respectfully submitted,

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Petitioner, In His Own Behalf.

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